

How to Stop Surreptitious Recording of Conversations in the Federal Workplace

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*So tell me Monica, what is this guy's name?*¹ A variety of Merit System Protection Board (MSPB) and Equal Employment Opportunity Commission (EEOC) cases illustrate that federal employees record their conversations with supervisors or coworkers without the other parties' knowledge or consent with some regularity. They do this because they perceive they are being harassed, discriminated, or retaliated against.² Such surreptitious behavior can be extremely disruptive in the workplace, destroying morale and impairing productivity.

This article offers approaches to combat surreptitious recording in the federal workplace. First, the article overviews the law, or lack thereof, regarding this type of behavior. Next, the article advises how agencies may stop such behavior and deal with employees who engage in it. Finally, the article explains how agency counsel should deal with surreptitious recordings in administrative hearings.

Laws, Regulations, and Policies

While there are various federal and state laws prohibiting the interception and covert recording of conversations by third parties,³ most do not apply when a party to the conversation makes the recording or consents to it.⁴ Likewise, there are no federal,

Department of Defense, or Department of the Army regulations, that prohibit employees from surreptitiously recording conversations in the workplace.⁵ Unless the recording took place in one of the few states that prohibits nonconsensual recording,⁶ there is nothing to prevent a federal employee from surreptitiously recording his co-workers or supervisors absent an order or local policy.

Pushing the "Stop" Button on Surreptitious Recordings

Several techniques can be used to stop employees from recording conversations. First, supervisors can order individual employees to stop taping conversations once they are discovered doing so. Once employees have been ordered not to surreptitiously record conversations with others, they can be disciplined for failing to comply with the order.⁷ A better approach, however, is to issue a local policy prohibiting the tape recording of conversations in the workplace with an exception for law enforcement or official investigation purposes.⁸ With such a policy in place, management could discipline employees who surreptitiously record other employees without having to issue a prior order to stop.

1. Linda Tripp is not the only federal employee to covertly tape-record conversations with coworkers. *In re Sealed Case*, 162 F.3d 670, 674 (D.C. Cir. 1999). Allegedly, Linda Tripp, a Department of Defense employee, secretly tape recorded conversations with her former coworker and friend, Monica Lewinsky. These recorded conversations, in part, led to the impeachment trial of President Clinton.
2. See generally *Capeless v. Department of Veterans Affairs*, 1998 MSPB LEXIS 761 (June 24, 1998); *McCartin v. Runyon*, 1996 EEOC LEXIS 1794 (Nov. 7, 1996); *Linares v. Widnall*, 1995 EEOC LEXIS 285 (Feb. 22, 1995); *Sawyer v. Browner*, 1994 EEOC LEXIS 3900 (May 12, 1994); *Sternberg v. Department of Defense Dependents Schools*, 1989 MSPB LEXIS 456 (June 6, 1989).
3. See, e.g., 18 U.S.C.A. §§ 2510-2520 (1999). The statute provides both criminal penalties and a civil cause of action for interception or recording of conversations. Section 2511(2)(d) provides, however, that the statute generally does not apply when the interception or recording is made by or with the consent of one of the parties to the communication.
4. But see CAL. PENAL CODE § 631 (West 1999); CONN. GEN. STAT. § 52-570d (1999); FLA. STAT. ch. 943.03(2)(a)3(d) (1999); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (1999); N.H. REV. STAT. ANN. § 570-A:2 (1999); OR. REV. STAT. § 165.543 (1999); PA. CONS. STAT. § 5704(4) (1999); WASH. REV. CODE ANN. § 9.73.030(1)(b) (West 1999). These states (California, Connecticut, Florida, Maryland, New Hampshire, Oregon, Pennsylvania, and Washington) require the consent of all parties to a conversation prior to recording. If an employee records conversations in these states without full consent, they could be criminally prosecuted under the applicable state law. See generally *Burton Kainen & Shel D. Myers, Turning Off the Power on Employees: Using Employee's Surreptitious Tape-Recordings and E-Mail Intrusions in Pursuit of Employer Rights*, 27 STETSON L. REV. 91 (1997).
5. The one exception is the EEOC's MANAGEMENT DIRECTIVE 110, FEDERAL SECTOR COMPLAINT PROCESSING MANUAL 2H2, available at <<http://www.eeoc.gov/federal/md110.html>>. This directive prohibits the recordings of telephone conversations during attempts to informally resolve Equal Employment Opportunity complaints.
6. See *supra* note 4.
7. *Capeless v. Department of Veterans Affairs*, 1998 MSPB LEXIS 761 (June 24, 1998); *Sternberg v. Department of Defense Dependents Schools*, 1989 MSPB LEXIS 456 (June 6, 1989).
8. In *Geissler v. Runyon*, the Employee Labor Relations Manual specifically prohibited employees from surreptitiously recording other employees without their consent; the appellant's violation of this provision led to a letter of warning. 1996 EEOC LEXIS 3852 (Nov. 21, 1996).

An additional advantage of the latter approach is that it can prevent discrimination or retaliation allegations lodged against the agency by a disciplined employee. In the EEOC appeal of *Linares v. Widnall*, the appellant alleged discrimination when he was ordered to stop recording conversations with coworkers while other employees who also tape recorded conversations were not.⁹ The EEOC administrative judge, in order to determine if the appellant had been discriminated against, ordered the agency to investigate whether other employees taped conversations, if agency officials were aware of the practice, and if the officials ordered them to cease recording.¹⁰ Whether recording is stopped through a direct order or by a local policy, supervisors need to ensure that all employees are treated alike to avoid allegations of discrimination, as in *Linares*.

Trying to “Erase” Recordings used in Administrative Hearings

Many federal employees who tape conversations with supervisors or coworkers are trying to get evidence of discrimination or harassment to use before the EEOC or other administrative forums. Unfortunately, administrative judges’ acceptance of surreptitious recordings gives employees the incentive to continue recording conversations.

One agency has specifically requested the EEOC to create an evidentiary rule requiring a party seeking admission of a recording to first establish its authenticity and to prove it was made consensually.¹¹ Yet, there is no prohibition against the use of tape recordings as evidence during EEOC hearings and they are normally freely admitted.¹² In one case, these liberal admission rules allowed an employee to submit tape recordings she withheld during the agency investigation as evidence during the hearing.¹³ Likewise, surreptitious recordings are admissible in

MSPB hearings because “[h]earsay evidence is admissible in Board proceedings.”¹⁴ The original tapes, copies of tapes, or transcripts of tapes are all equally admissible as there is no “best evidence” rule in MSPB proceedings.¹⁵

In *McCartin v. Runyon*, however, an EEOC administrative judge excluded the surreptitious employee recordings, believing that there would be a “chilling effect on [Equal Employment Opportunity] proceedings if complainants started surreptitiously taping telephone conversations with agency personnel.”¹⁶ The EEOC denied that the administrative judge’s ruling was an abuse of discretion.¹⁷

Conclusion

Surreptitious recording of workplace conversations degrades morale and productivity. Prohibiting such practices can help labor counselors from being “sandbagged” in an administrative hearing, and can encourage frank discussions during the entire complaint process. As a preventive law measure, labor counselors should work with their command to create a policy prohibiting tape recording of conversations within the workplace and enforce it equally with respect to all employees. Having such a policy in place can avoid subsequent allegations of discriminatory treatment if an employee is disciplined for making surreptitious recordings.

Finally, agency labor counselors, when practicing before the EEOC and MSPB, should reiterate the request for an evidentiary rule prohibiting surreptitious recordings as evidence. Until such a prohibition is created, labor counselors can and should argue that per *McCartin*, the administrative judge can and should exclude non-consensual tape recordings.

9. *Linares v. Widnall*, 1995 EEOPUB LEXIS 285 at *3 (Feb. 22, 1995).

10. *Id.* at *14.

11. *Williams v. Peterson*, 1995 EEOPUB LEXIS 3383 at *13 (Nov. 9, 1995).

12. *McCartin v. Runyon*, 1996 EEOPUB LEXIS 1794 at *5 (Nov. 7, 1996) (citing 29 C.F.R. § 1614.109(c) (stating formal rules of evidence are not strictly applied in EEOC hearings)).

13. *Sawyer v. Browner*, 1994 EEOPUB LEXIS 3900 (May 12, 1994). *But see* *Federman v. Brown*, 1997 EEOPUB LEXIS 395 *9 n.3 (Mar. 27, 1997) (“The Commission declines to consider these tapes as evidence in this case because there is no indication that this evidence was not available during the investigation of appellant’s complaint, and there are no assurances as to the authenticity of the tapes”).

14. *Middleton v. Department of Justice*, 1984 MSPB LEXIS 889 at *5 (Sept. 21, 1984) (citing *Banks v. Department of the Air Force*, 4 MSPB 342, 343 (1980)).

15. *Id.*

16. *McCartin*, 1996 EEOPUB LEXIS 1794 at *5.

17. *Id.* at *6.